

**Internal Revenue Service**  
**memorandum**

CC:TL-N-7653-87  
Brl:HFRogers

date: JUN 24 1987

to: District Counsel, Los Angeles CC:LA

from: Director, Tax Litigation Division CC:TL

subject: [REDACTED]

Dkt. No. [REDACTED]

This is in response to your request for technical advice dated May 15, 1987.

ISSUE

Whether to pay the \$60 filing fee requested by the petitioners pursuant to I.R.C. § 7430. 7430.00-00

CONCLUSION

We concur in your settlement proposal. Given the facts in the instant case, and the administrative errors involved, recent court cases clearly establish that an award of attorney's fees pursuant to section 7430 would be mandated.

STATEMENT OF FACTS

The Service issued a statutory notice of deficiency based on a Form K-1 which had been attached to the partnership return for [REDACTED]. The Form K-1 stated the petitioner, [REDACTED], was a partner in [REDACTED]. The Service had not located the petitioners' applicable tax return prior to the mailing of the notice of deficiency.

The taxpayers were requested by the Service to extend the time for assessment of tax, but they refused. As a result of their refusal, and the pending expiration of the statute of limitations on assessment, the Service proceeded to timely issue a statutory notice of deficiency to the taxpayers based on the information on the Form K-1.

The petitioners allege they contacted the Service on eleven different days before filing their Tax Court petition. They were attempting to notify the Service that they had not claimed the partnership loss reflected on the Form K-1 on their income

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tax return. They claim they were told repeatedly that the person they desired to talk to was unavailable, and that their call was disconnected once they finally reached the person they hoped to speak with. The Service failed to return any of their calls. The petitioners have at all times cooperated with the respondent's counsel in this matter.

Upon receiving the petitioners' applicable tax return, District Counsel confirmed that none of the partnership loss reflected on the Form K-1 was claimed by the petitioners on their applicable tax return. Respondent has therefore conceded that no deficiency exists.

The petitioners requested the return of their \$60.00 Tax Court petition filing fee. Respondent opposed this request based on Treas. Reg. §301.7430 because the petitioners refused to extend the statute of limitations on assessment. In light of several recently decided cases, the District Counsel now suggests conceding and returning the petitioners' filing fee.

#### DISCUSSION

Section 7430 authorizes the award of reasonable litigation costs to taxpayers in certain circumstances. Under section 7430, in order to be entitled to an award of litigation costs, the taxpayer must:

- (1) substantially prevail in the litigation (section 7430(c)(2)(A)(ii));
- (2) establish that respondent's position is not substantially justified (section 7430(c)(2)(A)(i)); and
- (3) have exhausted the administrative remedies available to that taxpayer in the Internal Revenue Service (section 7430(b)(2)).

See Minahan v. Commissioner, 88 T.C. No. 23 (March 3, 1987).

#### 1. Substantially Prevail

In the instant case, the taxpayers have substantially prevailed. Prevailing as to the most significant issue and prevailing as to the amount in controversy are alternative grounds for concluding the taxpayer has substantially prevailed. See Phillips v. Commissioner, 88 T.C. No. 26 (March 3, 1987). After receiving the petitioners' applicable tax return, the District Counsel determined that the petitioners had not claimed any of the partnership loss which was reflected on Form K-1. The Service conceded that no deficiency exists. Therefore, the petitioners prevailed as to both the issue and the amount so they have satisfied the requirements of section 7430(c)(2)(A)(ii).

## 2. Substantial Justification

While we do not believe that the petitioners can prove that our position was not substantially justified, we are concerned that given the lack of merit in our position, the court might rule favorably to the petitioners. The "position of the United States" as defined in section 7430(c)(4) includes (A) the position taken by the United States in the civil proceeding, and (B) any administrative action or inaction by the District Counsel of the Internal Revenue Service upon which such proceeding is based. This office is currently taking the position that unless the District Counsel reviewed the statutory notice of deficiency or was involved in the case at the administrative level there is no prelitigation position subject to scrutiny under the "not substantially justified" test of section 7430(c)(2)(A)(i). So far no court has decided whether our interpretation of section 7430(c)(4)(B) is correct. We would prefer to have the court resolve that issue in a case with stronger facts with which to advance our position.

## 3. Exhaustion of Administrative Remedies

The taxpayers in the subject case exhausted all administrative remedies available to them in the Internal Revenue Service. Because the statute of limitations had not been extended, the Service issued a notice of deficiency based on the information in the Form K-1. No 30-day letter was sent so the petitioners were unable to choose to participate in an Appeals office conference. See Tréas. Reg. § 301.7430-1(b)(ii).

We agree with Judge Simpson's concurring opinion in Minahan v. Commissioner, 88 T.C. No. 23 (March 5, 1987). The treasury regulations requiring an extension of the statute of limitations on assessment should be construed to include a test of reasonableness. "[W]hen the circumstances reveal that there was a reasonable need for the Commissioner to request an extension, the failure to grant one will constitute a failure to exhaust administrative remedies." Minahan, slip op. at 28. However, the instant case involves neither complex issues nor a multitude of legal or factual issues. The extension was requested because the Service was unable to locate the petitioners' applicable tax return at once. Further, the petitioners made numerous attempts to contact the Service and have the adjustment in the notice of deficiency corrected. Therefore, this case represents a poor litigating vehicle to advance the position that the petitioners failed to exhaust administrative remedies because they refused

to grant a reasonably requested extension of the statute of limitations.

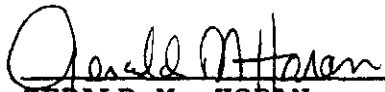
Moreover, the majority opinion in Minahan, supra, invalidated those subsections of Treas. Reg. § 301.7430-1 which required the petitioner to extend the statute of limitations. Accordingly, it is extremely doubtful that we could prevail on this issue if we did litigate this case.

CONCLUSION

We concur in your decision to settle this issue and pay the \$60.00 filing fee incurred by these petitioners. These taxpayers are entitled to an award of litigation costs pursuant to section 7430.

If you have any further questions, please contact Helen F. Rogers of this office at 566-3521.

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